In the

SUPREME COURT of the UNITED STATES

October Term, 1967

No. 187

THE MENOMINEE TRIBE OF INDIANS, et al.

v.

THE UNITED STATES

BRIEF OF THE STATE OF WISCONSIN, AMICUS CURIAE ON RE-ARGUMENT

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INTEREST OF THE AMICUS CURIAE

The decision of the Court of Claims is in direct opposition to the holding of the Wisconsin Supreme Court in *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 124 N. W. (2d) 41, cert. den. 377 U. S. 991. In that case it was held that the exclusive hunting and fishing rights granted to the Menominee Indians by the Wolf River Treaty of 1854 (10 Stat. 1064) were abrogated by the so-called "Termination Act" (25 U. S. C. secs. 891-902).

The Menominees commenced an action in the United States Court of Claims to recover compensation from the federal government for the taking of these rights. In grant-

ing the government's motion for summary judgment and dismissing the petition, the court held that the treaty rights referred to above were not abrogated by the Termination Act. In the course of its opinion, the court intimated that if these rights have been interfered with, it is due to the action of the State of Wisconsin acting through its supreme court and law enforcement officials. As a result of this opinion, and its threat of liability, the State of Wisconsin has a keen interest in the resolution of the issues before this court, and disagrees wholeheartedly with the lower court's opinion in this respect. The Wisconsin Supreme Court, following the mandate of a federal law which, we submit, is clear in its abrogation of Menominee hunting and fishing rights, cannot in any way subject the state to liability.

In the proceedings before the Court of Claims, the petitioners' contention was that the Termination Act abrogated and abolished the special hunting and fishing rights granted to the Menominee Tribe by the 1854 Treaty of Wolf River. *Menominee Tribe of Indians* (1967), 179 Ct. Cl. 496, 499-500. In the proceedings before this court on certiorari, the petitioners have reversed their position and now contend that the Act did not abolish these rights. The United States has undergone a similar reversal, for in *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 124 N. W. (2d) 41, cert. den. 377 U. S. 991, the Solicitor General argued to this court that the effect of the Termination Act was to "terminate the reservation status of the Menominee lands and to subject hunting rights on those lands to * * * state regulation." *State v. Sanapaw, supra,* Memorandum for the United States on Petition for Writ of Certiorari, No. 930, O. T., 1963, p. 2.

The State of Wisconsin filed a brief *amicus curiae*, and, being unaware of the petitioners' reversal of their position, did not include any discussion on what we feel to be highly important aspects of this case, bearing directly upon the sovereignty of the State of Wisconsin and its ability to apply and enforce its conservation laws in one of its 72 duly organized counties.

On January 29, 1968, the court ordered rebriefing and reargument of the cause, and invited the State of Wisconsin to participate.

It is our conviction that the treaty rights of the Menominees were indeed cut off by Congress and that the United States is fully and solely liable therefor.

SUMMARY OF ARGUMENT

The Wolf River Treaty of 1854 granted to the Menominees an unqualified right to hunt and fish their lands, free from all outside regulation. Thus, these rights are not derived from aboriginal user, but from a formal treaty with the United States.

Congress has always had plenary power to deal with Indians, and may pass laws in conflict with treaties made with Indians. Thus, Congress has the power to abrogate Indian privileges and rights, including treaty rights, by statute.

For over one hundred years prior to termination, the Menominee tribal government constituted the political organization of, and together with the United States provided governmental services to the Menominee people. The land was held by the government, and the government supervised virtually all aspects of reservation life.

The Menominee "Termination Act," Public Law 399, 83rd Congress, terminates federal trusteeship over the Menominee Indians and their lands, which formerly comprised the Menominee Indian Reservation. The Act also provides that the laws of the several states are applicable to the Menominee Indians in the same manner that such laws are applicable to other citizens within the states. The Act contains no reservation of hunting and fishing rights or privileges in favor of the Indians.

The stated purpose of the Termination Act was to subject the Menominees to the same laws, privileges and responsibilities as are applicable to all other citizens. The legislative history shows that Congress was advised that the language of the Act would extinguish the hunting and fishing rights, yet Congress made no express provision reserving such rights, even though it had before it another version of the bill which specifically would have reserved them.

The termination plan adopted by the Secretary of the Interior pursuant to the act transferred all tribal assets, including title to the reservation lands, to a private corporation in which enrolled members of the tribe were shareholders.

The Wisconsin legislature took all steps necessary to duly organize the reservation lands into a county, and set up the machinery for the usual governmental services and functions.

The net result of the Act, the plan, and its implementation, was to dissolve the tribe and the reservation, and to extinguish the treaty hunting and fishing rights. The

Klamath Termination Act, and the cases decided thereunder, are consistent with this view.

The contemporaneous enactment of Public Law 280 does not indicate any legislative intent to preserve hunting and fishing rights under the Termination Act. Nor does the reference to Public Law 280 in the Termination Plan lead to any similar inference. Rather, it leads to the inference that Congress intended that state law regarding the management of fish and wildlife was to apply to the new county in the same manner that state law regarding the maintenance of law and order was to apply.

Affirmance of the decision below, without clarification, will leave the State of Wisconsin in an impossible situation insofar as implementation of its conservation management and enforcement programs in Menominee County is concerned.

The abrogation of exclusive hunting and fishing rights under the Termination Act constitutes a loss of valuable property rights, and is compensable by the federal government.

ARGUMENT

I. PRIOR TO TERMINATION, THE MENOMINEE TRIBE WAS POSSESSED OF THE EXCLUSIVE AND UNRESTRICTED RIGHT TO HUNT, FISH AND TRAP THE RESERVATION LANDS FREE FROM STATE REGULATION.

Between 1817 and 1854 the United States and the Menominee Tribe executed six treaties dealing with land cessions and territorial grants. On May 12, 1854, the government and the tribe signed the document known as the Treaty of Wolf River, which created the Menominee Indian Reservation through a cession of certain lands to the Menominees "to be held as Indian lands are held." 10 Stat. 1064. Both the Wisconsin Supreme Court, and the United States Court of Claims in the decision now under review, have held that the language of the 1854 treaty granted to the Menominees an unqualified right to hunt and fish their lands free from all outside regulation and control. *State v. Sanapaw* (1963), 21 Wis. (2d) 377, 383, 124 N. W. (2d) 41; *Menominee Tribe of Indians* (1967), 179 Ct. Cl. 496; *Menominee Tribe of Indians* (1941), 95 Ct. Cl. 232, 240-241. See also *Moore v. United States* (9th Circ. 1946), 157 F. (2d) 760, cert. den. 330 U. S. 827. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was the holding in *Winters v. United States* (1908), 207 U. S. 564, 576, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein this court declared:

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine be-

tween two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

It is unlikely that the Menominees would have knowingly relinquished the special fishing and hunting rights which they enjoyed on their own lands, and accepted in exchange other lands to which such rights did not extend. They undoubtedly believed that these rights were guaranteed when other lands were ceded to them "to be held as Indian lands are held."

Thus, the rights of the Menominees in this respect do not derive from aboriginal user, but from a formal treaty with the United States government.

II. CONGRESS HAS PLENARY POWER TO DEAL WITH INDIANS, AND MAY BY STATUTE ABROGATE INDIAN RIGHTS AND PRIVILEGES, INCLUDING THOSE SECURED BY TREATY.

Congress has plenary power to deal with Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. *Super et al. v. Work* (CCA, D. C., 1925), 3 F. (2d) 90, affirmed per curiam, 271 U. S. 643. The power of Congress over Indian tribes and tribal property cannot be limited by treaty so as to bar repeal or amendment by later statute. *Ward v. Race Horse* (1896), 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244; *Lone Wolf v. Hitchcock* (1903), 187 U. S. 553, 565-567, 23 S. Ct. 216, 47 L. Ed. 299; *United States v. Waller* (1917), 243 U. S. 452, 37 S. Ct. 430, 61 L. Ed. 843; *Anderson v. Gladden* (CCA 9th, 1961), 293 F. (2d) 463, Cert. denied 368 U. S.

949. See also, *Cain v. First Nat. Bank of Oregon* (9th Cir. 1963), 324 F. (2d) 532.

The extent to which tribal Indians should be emancipated from their status as wards of the Federal Government is a matter which rests entirely within the discretion of Congress. *Lone Wolf v. Hitchcock, supra,* pp. 565-567; *United States v. Waller, supra,* pp. 459-460.

In *Lone Wolf v. Hitchcock, supra,* this court stated (187 U. S. at p. 566):

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. * * *"

See also *Chemah v. Fodder* (D. C., W. D. Okla., 1966), 259 F. Supp. 910, 914.

Indian tribes have always been regarded as dependent nations, or quasi-sovereigns, and treaties with them have been looked upon not as contracts, but as public laws which may be abrogated at the will of the United States. *Choate v. Trapp* (1912), 224 U. S. 665, 671, 32 S. Ct. 565, 56 L. Ed. 941; *Sioux Tribe of Indians v. United States* (Ct. Cl., 1956), 146 F. Supp. 229, 236.

Where, as here, treaty provisions operate as domestic legislation, they have no greater legal force or effect than legislative acts, and when a treaty is inconsistent with a subsequent act of congress, the latter prevails under ordinary rules of statutory construction. U. S. Department of the Interior, *Federal Indian Law* (1958), pp. 24-25. See also *Ward v. Race Horse, supra*, p. 514.

It is interesting to note that in a treaty executed two years after the Wolf River Treaty the Menominees and the government stipulated as follows:

> "1. That if this agreement and the treaties made previously with the Menominees should prove insufficient, from causes which cannot now been (be) foreseen, to effect the said objects, the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of the affairs of the Menomonees as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary." Treaty of February 11, 1856 (11 Stat. 679).

III. THE PLAIN LANGUAGE AND THE LEGISLATIVE HISTORY OF THE MENOMINEE "TERMINATION ACT" (25 U. S. C. §§ 891-902) INDICATES CLEARLY THAT, BY SO ACTING, CONGRESS EXTINGUISHED THE HUNTING AND FISHING RIGHTS GRANTED TO THE MENOMINEES BY THE WOLF RIVER TREATY.

A. Prior to Termination, the Menominee Tribal government and the federal government provided the political framework of the Menominee Society.

Each Indian Tribe began its relationship with the federal government as a quasi-sovereign, and while subsequent conquest rendered the tribes subject to the legislative power of the United States, it did not extinguish the tribes' internal sovereignty, or their powers of self-government. *Federal Indian Law, supra, pp.* 395-396.

In the case of the Menominees, tribal membership originally depended upon birth or adoption into the tribe, the maintainance of tribal relations, and recognition of membership by the tribe. Eventually, tribal enrollment was governed by the Secretary of the Interior.

For over a hundred years the Menominee people had lived in Wisconsin under uncodified and undefined tribal law supplemented by federal laws and federal agency supervision. Their pattern of life has always been that of a comparatively isolated group in the social, economic and governmental structure of the state and nation.[1]

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[1]Wisconsin Legislative Council, 1965 Report, Vol. III, **Report of Menominee Indian Study Committee**, p. 13.

In 1928 the Menominees adopted a tribal constitution under which the tribe operated until implementation of the Termination Act. The constitution vested governmental authority in a tribal council (a "Town Meeting" form of organization). The reservation was divided into six districts for election of the members of the Advisory Council, which was the executive body. The Advisory Council, chaired by a full-time, salaried official, had authority over most matters of direct importance to the tribe, although the Bureau of Indian Affairs processed most major decisions.[2]

The Advisory Council operated through twelve standing committees: Pension and Relief; Forestry and Mills; Education and Hospital; Law and Order; Fair Association; Agriculture; Recreation; Garment Factory; Land Use; Finance; Governmental Planning and Economic Development.[3]

The general council met in semi-annual and special meetings on call of the Advisory Council, as approved by the Reservation Superintendent, the principal local agent of the Bureau of Indian Affairs.[4]

The Council's role in law enforcement was sizeable and direct—the Law and Order Committee supervised a tribal police department of four full-time policemen, a game warden and part-time assistants.[5]

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[2]Robertson, "A Brief Story of the Menominee Indians," **Journal of the Wisconsin Indians Research Institute** (March, 1965), pp.4, 13.

[3]Wisconsin Legislative Council, 1965 Report, **supra**, note 1, p. 59.

[4]Report To The Menominee Indian Study Committee On County And Local Government For The Menominee Indian Reservation, prepared by the Bureau of Government, the University of Wisconsin, Madison, October 1, 1956, p. 13.

[5]**Ibid.**, p. 25.

As with most Indian reservations, the land was free from the property tax. There were some service charges for public utility services, but no property or other local taxes were levied.[6] Prior to termination, reservation homesites were not individually owned.[7]

The Menominee Community, broadly speaking, was an integrated combination of industrial, municipal, and human relations activity—including public health, education, welfare, credit, law and order functions—all of which were sustained or paid for from tribal funds held in trust in the United States Treasury. These funds were subject to use for the above purposes only through appropriation by Congress. Indeed, the federal function was to retain general guardianship of the Menominee people and their property, including general supervision of the area's only industry—the mill and forestry operation.[8]

B. The 1954 Termination Act: Terms

In 1954 Congress provided for the termination of all federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation by Public Law 399, 83rd Congress, popularly known as the "Termination Act" (68 Stat. 250, as amended, 70 Stat. 544, 70 Stat. 549, 72 Stat. 290, 74 Stat. 867; 25 U. S. C. secs. 891-902). The Act provides, in pertinent part as follows:

> "§ 891. The purpose of sections 891-902 of this title is to provide for orderly *termination* of Federal

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[6]Wisconsin Legislative Council, 1965 Report, supra, Note 1, p. 17.

[7]Ibid., p. 35.

[8]Ibid., p. 13.

supervision over the *property and members* of the Menominee Indian Tribe of Wisconsin. . . .

"§ 893 . . . At midnight of June 17 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment. . . .

* * *

"When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe. § 3, 68 Stat. 250.

"§ 896. . . . The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary *a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order,* and for all other matters involved in the withdrawal of Federal supervision.

* * *

"The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to

section 893 of this title, and that it conforms to applicable Federal and State law.

"*The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961,* or on such earlier date as may be agreed upon by the tribe and the Secretary. *The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife.* To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan.

"§ 897 . . . On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. . . .

"The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefits. . . .

"§ 899 . . . When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. *Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all stat-*

utes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States." (Emphasis supplied)

In addition, Section 894 of the Act provided for per capita payments to all enrolled members of the tribe.

On April 29, 1961, the Secretary of the Interior, having approved The Termination Plan (which will be discussed below), proclaimed the transfer of title to all tribal trust property as follows (26 Federal Register, No. 82, p. 3726):

"Pursuant to the authority contained in section 10 of the Act of June 17, 1954 (Public Law, 83-399; 68 Stat. 250), it is hereby proclaimed that the *title to all property, real and personal, held in trust by the United States for the Menominee Tribe has been transferred* in accordance with section 8 of the Act of June 17, 1954, *supra, and that effective midnight April 30, 1961, individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*

"As required by section 7 of the Act of June 17, 1954, *supra*, the Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions is published and appears immediately below this notice." (Emphasis supplied)

Upon publication of the plan in the Federal Register in connection with the cited proclamation by the Secretary of the Interior, Ch. 259, Wis. Laws 1959, became effective, and what was formerly the Menominee Indian Reservation became Wisconsin's 72nd county.

C. The 1954 Termination Act: Legislative History and Purpose.

The policy of termination had its genesis in the 1940's. In 1949, the then Commissioner of Indian Affairs stated that it was not the intention of the federal government to continue in its role as Indian trustee, and that:

> "Development of * * * property to full utilization and encouragement of the owner to accept responsibility for management. These are the proper goals of Indian administration. They are the means by which the United States may, within a reasonable time, withdraw entirely from its historic role and turn over its trusteeship to a trained and responsible Indian people."
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> *Annual report of the Secretary of the Interior*, 1949, p. 388.

Similar manifestations of the government's intent ultimately to transfer Indian Bureau functions to the Indians themselves, or to appropriate state and local agencies, are recounted in *Federal Indian Law*, *supra*, p. 261.

This court acknowledged the federal policy of "emancipation" in *Williams v. Lee* (1959), 358 U. S. 217, 220-221, 79 S. Ct. 269, 3 L. Ed. (2d) 251, wherein it is stated that:

> "Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This contemplates criminal and civil jurisdiction over Indians by any state ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them."

This policy was amply stated by Congress in House Concurrent Resolution 108 which started the process of termination for the Menominees, and which stated, in pertinent part, as follows: (67 Stat. 132, 83rd Cong. 1st Sess.):

> "Whereas it is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States *subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States,* to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> Whereas the Indians within the territorial limits of the United States should *assume their full responsibilities as American citizens:* Now therefore, be it RESOLVED BY THE HOUSE OF REPRESENTATIVES (THE SENATE CONCURRING), That it is declared to be the sense of Congress that, at the earliest possible time, all of the following-named Indian tribes and individual members thereof, should be *freed from Federal supervision and control and from the disabilities and limitations specially applicable to Indians:* * * * The Menominee Tribe of Wisconsin. * * * It is further declared to be the sense of Congress that, up-

> on the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas, and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished." (Emphasis supplied)

It became clear at the hearings on H. C. R. 108 that the government was committed to a policy of "extricating itself from Indian Affairs." See *Hearings Before the Subcommittee on Indian Affairs, House Committee on Interior and Insular Affairs*, 83rd Cong., 1st Sess., pp. 4, 7.

A later comment on the policy of termination is found in 38 Oregon L. Rev. 193, 241 (1959):

> "In essence, the government, which has maintained the Indians in the status of 'wards' for a century and a half, has finally wearied of its role as guardian and is closing shop on the reservations. * * * The new federal policy is a resumption of pre-New Deal attempts to compel the tribesmen to acculturate themselves to the general American culture. * * *"

The original legislative proposal, which was finally enacted by the 83d Congress in 1954 as the Termination Act, originated in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before subcommittees of the Senate Committee on Interior and and Insular Affairs and the Committee on Interior and Insular

Affairs of the House of Representatives on March 10, 11, and 12, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees might have by treaty, statute, custom, or judicial decision. H. R. 2828 contained no such corresponding provision.

The court below referred to the testimony of two witnesses appearing before the house committee who expressed their opinion that H. R. 2828's silence on the subject would not affect hunting and fishing rights acquired by treaty, but only those acquired by statute (179 Ct. Cl., at pp. 505-506). It should be noted, however, that neither witness mentioned the provision of H. R. 2828 (now sec. 899 of the Act) stating that: *"the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."* (Italics supplied.) See *Joint Hearings Before the Subcommittee of the Committees on Interior and Insular Affairs,* 83rd Cong., 2nd Sess., on S. 2813, H. R. 2828 and H. R. 7135. (Hereafter referred to as "Joint Hearings.")

It is also a fact, barely alluded to by the court below, that the general counsel for the then Menominee Tribe, Mr. Glen Wilkinson, filed a memorandum with the joint committee, testified at the hearings, and in both his memorandum and testimony specifically disagreed with the two other witnesses, and stated that H. R. 2828 would, by its silence, abrogate Indian hunting and fishing rights.

In his memorandum, Mr. Wilkinson stated in part (Joint Hearings, pp. 697, 704):

> "On page 4 (item 7) the statement is made that 'H. R. 2828 contains no provision on this subject. It

does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

Mr. Wilkinson testified, in part:

"I just want to comment briefly on a few points included in the Department's report of March 5. As I have already noted, I think they have a good point respecting section 3. On page 4, item 7 of that report, the statement is made that H. R. 2828 contains no provision on this subject. It goes on to say that it does not purport to affect any treaty rights the Indians may have.

"I have already covered this somewhat, *but in my judgment* I think it is clear that it does affect those treaty rights and that *those treaties are abrogated. Certainly it abolishes the tribal right to exclusive hunting and fishing privileges, because automatically upon the final termination date, the Menominee Reservation so far as hunting and fishing is concerned, would become subject to the laws of Wisconsin.*" (Joint Hearings, p. 708, Emphasis added.)

Thus advised by the General Counsel for the tribe, and with an alternative bill before it which would have expressly reserved hunting and fishing rights (H. R. 7135), Congress enacted the bill which was silent to such rights.

D. Termination—The Plan and the Corporation.

The Termination Act required the Menominees to prepare a plan for future control of tribal property and service functions—including health, education, welfare, credit, roads, and law and order, and "other matters involved in termination." 25 U. S. C. § 896. Another portion of § 896 required the plan to "contain provisions for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife."

The plan as submitted to, and approved by, the Secretary of the Interior, was published in 26 Federal Register, No. 82, p. 3726, and had as its stated objectives: (1) The development of machinery for "municipal activities previously supervised by the Department of the Interior, including health, education, welfare, credit, roads, and law and order;" and (2) the development of a sound economic base through operation of the forest on a sustained yield basis. The heart of the plan is the transfer of all tribal property to a private corporation, Menominee Enterprises, Inc.

In the eyes of the tribe, the subjects of local government and business organization were closely related, for the Menominee people had long been dependent economically upon the forest and lumber mill. As indicated above, the mill operations, like the tribal government and political machinery, had been supervised by the Bureau of Indian Affairs.

In essence, all tribal assets—the forest lands and all the other property of the Menominees—were transferred to the corporation, except for the roads, highways and certain public buildings. The corporation is managed by a

voting trust set up under Wisconsin's general corporation law. The 3,270 Menominees who were enrolled at the time the tribal rolls were closed in 1954 each have a 1/3270th equity in the corporation.

The plan provided that the lands transferred to the corporation could not be alienated for a period of 30 years.[9] The voting trust contemplated by the plan prohibits the trustees from selling the trust stock without approval of the State Conservation Commission and the governor for a period of 30 years. No trust beneficiary could transfer any trust certificates—except to his family or heirs—for five years.[10] After that time, transfer may be made after first offering the certificates to the corporation. All restrictions on alienation expire on January 1, 1981.

A special trust was set up for minor and incompetent enrolled members.

The plan also mentions the desirability of a merit system in government, the transfer of tribal buildings to municipal use, the distribution of state escrow funds to the new county, the improvement and transfer of roads within the reservation to the new county, etc., and states (appendix, p. 6-a):

> "It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservations having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U. S. C. 1162)."

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[9]The restrictions are found in sec. V of the Menominee Common Stock and Voting Trust. See **Federal Register**, Vol. 26, No. 82, April 29, 1961, p. 3726, **et seq.** Appendix, p. 1-b, **et. seq.**

[10]This five-year period expired in 1966.

There is no mention of a plan for "fish and wildlife."

Menominee Enterprises, Inc., was incorporated under Wisconsin's general corporation law prior to the Secretary's proclamation. The Articles of Incorporation authorize the corporation to engage in any lawful corporate activity, and, particularly, to manage the business and property transferred to it by the United States. See *Federal Register*, Vol. 26, No. 82, April 29, 1961, p. 3726.

E. Termination—State Legislation.

The 1959 Wisconsin Legislature enacted a series of laws in anticipation of termination (Chs. 258, 259 and 260, Laws of 1959). These laws related to the following:

(1) Providing a new method of taxation and regulation of forest lands required by federal law to be operated on a sustained-yield basis;

(2) Creation of a new county to be named "Menominee County," and comprising the lands of the reservation (7 townships in Shawano County and 3 townships in Oconto County);

(3) Attachment of Menominee County to existing Congressional, State Senate and State Assembly districts;

(4) Attachment to Shawano and/or Oconto Counties for the provision of certain political and service functions, such as: county superintendent of schools and school districts; juvenile court; district attorney; divorce counsel; circuit court; county and municipal courts, etc.;

(5) The structure and manner of selecting county and town governing bodies and officers;

(6) Methods of real and personal property valuation, assessment and taxation;

(7) Pro-ration and sharing of expenses of district attorney, county and circuit judges, etc., with Oconto and Shawano Counties;

(8) Distribution of state tax credit funds to Menominee County.

In addition, laws were enacted dealing with land and title records, legal settlement and residence, town taxation, permission to restrict alienation of corporate stock for 5 years, etc. Other pertinent state legislative acts relating to Menominee County are summarized in Appendix C.

IV. THE NET RESULT OF THE TERMINATION ACT WAS THE DISSOLUTION OF THE MENOMINEE TRIBE, THE ERADICATION OF THE MENOMINEE RESERVATION, AND CONCOMITANTLY, THE EXTINCTION OF ANY SPECIAL HUNTING AND FISHING RIGHTS GRANTED BY THE WOLF RIVER TREATY OF 1854.

The Treaty from which the Menominees' hunting and fishing rights derive was the document establishing the Menominee Reservation. Through the Termination Act, and the steps taken thereunder, the United States has divested itself of all right, title and interest to the lands which comprise what was formerly the Menominee Indian Reservation, and has ended its trusteeship over the lands. Title to the forest land is now held by Menominee Enterprises, Inc., a private Wisconsin stock corporation. Title

to certain parcels of land has been conveyed by the corporation to individuals for homesites. What was formerly the reservation is now Wisconsin's 72nd county, governed by a Wisconsin County Board and a Town Board. (Wis. Laws, 1959, Ch. 259.) The entire land area is now on the tax rolls. Enrolled members of the Tribe are residents of the town and county, are subject to the State's tax laws, and elect town and county officers (Wis. Laws, 1959, Ch. 259).

Prior to final termination, homesites were not individually owned within the reservation. Between 1961 and 1965, however, 426 homesites and 146 farms averaging over 100 acres each had been conveyed to individual Menominees. See Wisconsin Legislative Council, 1965 Report, Vol. III, p. 35.

Menominee Enterprises, Inc., is indeed the "successor entity to what formerly was the Menominee Tribe. It was recognized as such by the Bureau of Indian Affairs of the United States Department of the Interior in a 1965 report of that agency to the House Committee on Appropriations, wherein it is stated (111 *Congressional Record*, No. 57, p. 6093, March 30, 1965):

> "The experience of the Menominees under termination may be examined first of all in terms of *the two entities established by the state law as successors to the Menominee Indian Tribe*. One of these, a State corporation, was Menominee Enterprises, Inc., to which was conveyed all the tribal land which had comprised the reservation * * * the other was a new county, Wisconsin's 72d, carved from the two counties in which the reservation had been located and with borders identical to those of the reservation." (Emphasis added)

A reservation is, after all, "simply a part of the public domain set aside by proper authority for use and occupation by a group of Indians * * * The United States holds the title and the right of use and occupancy is in the Indians." *Federal Indian Law, supra,* p. 20. Similarly, it has been stated that, while neither allotment nor citizenship alone imply a termination of tribal existence, they are factors to be considered—along with the cessation of participation in tribal resources and tribal government. *Federal Indian Law, supra,* p. 465. See also *Healing v. Jones* (D. C., Ariz., 1962), 210 F. Supp. 125, 180, affirmed 373 U. S. 758, 83 S. Ct. 1559, 10 L. Ed. (2d) 703; *Colliflower v. Garland* (9th Circ., 1965), 342 Fed. (2d) 369, 377.

The legislative history of the Termination Act, the plan approved by the Secretary and implemented by the Wisconsin legislature, and the present status of the Menominee people, are wholly inconsistent with any notion that either the Menominee Tribe or the Menominee Indian Reservation has continued in existence. The effect of these actions has been to strip away all vestiges of organized tribal structure, and to make all Wisconsin laws—including the fish and game regulations—applicable to all residents of Menominee County, and enforceable within the county boundaries in the same manner that such laws are applicable to other citizens within the state. *Cf.* 25 U. S. C. § 899.

The United States, through the Congress and the Department of the Interior, has clearly and unequivocally terminated the tribal existence and reservation status of the Menominees. All tribal property is owned by a private corporation and what was formerly the Menominee Reservation is a duly organized Wisconsin County, with all the

powers, duties and liabilities of a County. By so acting, the Congress of the United States has extinguished the special hunting and fishing rights which accrued to the Menominee Tribe by virtue of the 1854 Treaty.

V. THE COURT OF CLAIMS' CONSTRUCTION OF THE TERMINATION ACT IS CONTRARY TO THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY THEREOF, AND THE CURRENT STATUS OF THE FORMER MENOMINEE TRIBE.

Sec. 891 of the Termination Act provides that its purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the act provides that upon the Secretary of the Interior's publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' preexisting special hunting rights to the state's game laws. However, the court below felt that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of the Congress.

As indicated earlier in this brief, Congress was advised by the tribal attorneys that passage of H. R. 2828 would "abrogate" the tribal hunting and fishing rights granted therein. Being so advised, and with alternate bills before it which would have expressely reserved hunting and fishing rights to the Menominees (S. 2813 and H. R. 7135), Congress enacted the bill which was silent on this point. It is clear from this, together with the myriad facts of termination discussed above, that Congress knowingly and intentionally chose to extinguish the treaty hunting and fishing rights. The continuation of such rights after termination is inconsistent with not only the plain language of the Act, but also its purpose, effect, and legislative history.

The Court below held otherwise, basing its decision on two facts: (1) The subsequent passage of Public Law 280; and (2) the reference to P. L. 280 in one portion of the Menominees' termination plan.

A. The enactment of Public Law 280 does not justify the court's interpretation of the Termination Act as preserving the hunting and fishing rights of the Menominees.

The Termination Act was passed on June 17, 1954 (P. L. 399, 83rd Congress, 68 Stat. 250). A few months later, Congress extended the provisions of P. L. 280 to the Menominee Indian Reservation (P. L. 661, 83rd Congress, 2nd session, August 24, 1954, 68 Stat. 795). Public Law 280, as amended, conferred civil and criminal jurisdiction over the Menominee Indian Reservation upon the state, and *expressly reserved* to the United States jurisdiction

over hunting and fishing, water, and certain property rights. Public Law 280 (18 U. S. C., sec. 1162, 28 U. S. C., sec. 1360), provides in part as follows:

> "(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> * * *
>
> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian of any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.
>
> * * *
>
> "§ 1360. State civil jurisdiction in actions to which Indians are parties
>
> "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed op-

posite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

* * *

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance of custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

The Court of Claims, in the decision under review, stated that since the Act was silent on the question of preservation or abrogation of the treaty rights, "* * * we must look to the legislative history of the Act * * * to determine if it cut off these rights by implication." 179 Ct. Cl. at p. 505. After a brief discussion of the two bills pend-

ing before Congress at the time, the Court concluded, (179 Ct. Cl. at p. 507):

> "It is logical to assume that the Congress, acting through its committees . . . as well as by its own action as a whole, knew that hunting and fishing rights were being protected in Public Law 280 and there was no need to mention them in the Termination Act."

The court has given no evidence even hinting such a legislative state of mind, and we have been unable to find any such suggestion in the multitude of hearing reports and other documents bearing upon the Termination Act—which is, after all, the legislation being interpreted by the court. The only point made by the documented history of the Act is that Congress had two bills before it—one which would have expressly preserved the hunting and fishing rights, and another which, as they were advised by the attorney for the tribe, would "abrogate" and "abolish" these rights. Congress chose the latter.

It is submitted that the "logical assumption" of the Court of Claims is no more than speculation, and, as such, is insufficient to overcome the plain language of the Act, buttressed by the only documented history of its travel through Congress. The Termination Act clearly fulfilled its stated purpose of making the laws of Wisconsin applicable to the Menominees "in the same manner as they apply to other citizens or persons within * * * (its) * * * jurisdiction." 25 U. S. C. § 899.

B. The Reference to Public Law 280 in one portion of the Termination Plan does not require the construction of the Termination Act adopted by the Court below.

As indicated above, the Termination Act required the Tribe to prepare a plan which, when approved and proclaimed by the Secretary of the Interior, would effectuate the termination. As may be seen from the relevant portion of the Act (25 U. S. C. p. 896, reprinted at pp. 13-14, *Supra*), the pertinent plan requirements were separate. At the beginning of sec. 896 it is stated:

> "The tribe shall * * * formulate * * * a plan * * * including services in the fields of health, education, welfare, credit, roads, and law and order. * * *"

At the end of the section the following appears:

> "The plan shall contain provision for protection of the forest on a sustained yield basis and for protection of the water, soil, fish and wildlife."

The court below quoted the requirement of § 896 dealing with a plan for protection of forest, water, soil, fish and wildlife. The court then quoted the following excerpt from the plan (179 Ct. Cl. at p. 508; See Appendix p. 6-a):

> "It is unnecessary, aside from amendment of Wisconsin laws to accord with existing judicial machinery, to provide specific plans for future handling of law and order, federal jurisdiction over the Menominee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U. S. C. 1162)."

From these two items the court concluded that Public Law 280 was made a part of the plan by reference, and

that, as a result, it was unnecessary for Congress to specifically preserve the hunting and fishing rights in the Termination Act. 179 Ct. Cl. at p. 508.

First of all, the plan was prepared by the Menominees themselves, and whatever its terms, it is not part of the legislative history of the Act, nor can it be used, as the Court of Claims appears to have done, to indicate the intent of Congress in passing the Termination Act some seven years earlier.

Secondly, the quoted portion of the plan refers to "law and order"—it does not pertain to protection of fish and wildlife. It is merely the fulfillment of another separate and distinct requirement of the Act. It cannot be said that, by referring to Public Law 280 in connection with a specific requirement dealing with "law and order," the provisions thereof are incorporated into another portion of the plan pertaining to the protection of forests, soil, water, fish and wildlife. The legislative requirements for inclusion of these items in the plan appear in different portions of sec. 896 of the Act.

Even if the chain of inferences may be so extended, it furnishes no basis for declaring the intent of Congress, in passing the Termination Act, to "protect and preserve" rights which the plain language of the act abrogates.

There is another, far more tenable, inference that may be drawn from all this, and that is the inference that Congress, in abrogating the exclusive and unrestricted hunting and fishing rights of the Indians, intended that state law should apply and that the plan itself, which was submitted to the Secretary of the Interior for approval, should reflect the adequacy of the state law to protect fish and wild-

life. This conclusion is supported by the fact that the Termination Act also required that the plan provide for ". . . protection of the forest on a sustained yield basis . . . ," and authorized the Secretary of the Interior to accept the tribe's plan provided that he found ". . . that it conforms to applicable Federal and State law" (25 U. S. C. 896). Significantly, the plain itself provides for protection of the forest on a sustained yield basis, as required by 25 U. S. C. sec. 896, and state legislation for that specific purpose was enacted (Wis. Laws 1959, ch. 258; see *Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions*, 26 Fed. Reg. No. 82, April 29, 1961, p. 3727 et seq., Appendix, p. 2-a). The plan, on the other hand, contains no express provision for the protection of fish and wildlife. It is therefore fair to conclude that, in view of the abrogation of the Indian's rights in this area, separate provision for protection of fish and wildlife was unnecessary since such protection would be provided by the application of Wisconsin's conservation laws to the land and its people.

It should also be noted that the Wisconsin Supreme Court was not, as the court below indicates, unapprised of the passage of Public Law 280 when it rendered its decision in *State v. Sahapaw, supra*. The brief filed by the State of Wisconsin on rehearing in that case devoted 3 to 5 pages to a discussion of P. L. 280, and quoted extensively from its text.

VI. THE KLAMATH ACT, AND THE CASES DECIDED THEREUNDER, DO NOT SUPPORT THE DECISION OF THE COURT BELOW.

The Court of Claims indicated that its decision on the effect of the Termination Act is supported by three cases involving the Klamath Indians. 179 Ct. Cl. at pp. 511-512. The only one of the three cases which was reported, *Klamath and Modoc Tribes v. Maison* (D. C., Ore., 1956), 139 F. Supp. 634, did not mention the Klamath Termination Act (25 U. S. C. § 564), and, in fact, was decided five years before the Klamath termination was effected. See 26 *Federal Register*, August 12, 1961, p. 732.

The Court of Claims mentioned, however, that the two unreported cases held that the act preserved prior treaty rights. 179 Ct. Cl. at pp. 511-512.

The Klamath Termination Act gave each tribal member the option of remaining in the tribe and participating in a "tribal management plan" *to be prepared by a designee of the Secretary of the Interior,*[11] or of withdrawing from the tribe and having his interest in the tribal property converted into cash and paid to him outright. 25 U. S. C. § 564d (2). The Secretary was authorized to sell certain portions of the tribal land to obtain funds to pay those members electing to withdraw from the tribe, and any such lands not sold would be purchased by the United States. 25 U. S. C. § 564w. The remaining land, to be retained for those Indians electing "to remain in the tribe" is designated as "tribal property" and is to be managed by a trustee, apparently as a reservation. 25 U. S. C. § 564d.

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[11]Under the Menominee Act, the Menominee Indians were responsible for preparing their own plan.

The differences between the Klamath and Menominee termination programs are obvious. In the case of the Menominees, all tribal property, and all reservation lands were conveyed to a private corporation. Many of these lands have been sold to individuals. No Menominee had the option of "remaining in the tribe," as did the Klamath people. Instead, the Menominees were required to "formulate a plan for future control of tribal property and service functions." 25 U. S. C. § 896. Pursuant to the plan, the United States relinquished all interest in the real and personal property of the Menominee tribe.

It is true that the Klamath Act contained much of the same general language pertaining to application of "the laws of the several states." See, for example, 25 U. S. C. § 564q. However, the provisions of the Klamath Act differ in several significant respects in addition to those mentioned above. See for example, 25 U. S. C. § 564e (c); § 564r, which contemplates the continued existence of a tribal government; § 564w(q), which limits individual homesites to a life estate only; and § 564w(i), which reserves highway right of way use and maintenance to the United States.

The most notable differences are found in the express reservation to the Klamaths of water rights and treaty fishing rights. In fact, specific reservations of water rights are found in the Ute, Paiute, Wyandotte and Ottawa Termination Acts. 25 U. S. C. §§ 677r, 757, 806 and 851.

The reserved fishing rights of the Klamaths were considered—along with the effect of the Klamath Termination Act on hunting and trapping rights—in *Klamath and Modoc Tribes v. Maison* (9th Circ. 1964), 338 Fed. (2d) 620, which was not discussed in the decision of the Court

of Claims. There the question was whether those Klamaths who elected to remain in the tribe had an untrammeled right to hunt and trap upon former reservation lands which had been taken by the United States pursuant to § 564w of the Klamath Termination Act, discussed above. The court held that such rights had been lost, stating (pp. 622-3):

> *"The same issue was presented in State v. Sanapaw* (1963) 21 Wis. 2d 377, 124 N. W. 2d 41, cert. denied (1964) 377 U. S. 991, 84 S. Ct. 1911, 12 L. Ed. 2d 1044. That case dealt with the Act terminating the Menominee Tribe upon substantially the same terms as those of the Act before us. There the Court referred to House Concurrent Resolution 108, 83d Congress, 1st Session, pursuant to which the Menominee Termination Act was drafted and introduced. That resolution recited the policy of Congress 'as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.'
>
> "The Wisconsin Supreme Court referred to language of the Act 'hat 'the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.' It concluded that 'the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation.'
>
> "The United States, appearing here as amicus curiae through the Attorney General, has in its brief expressed its view as follows:

'The Klamath Termination Act and the many other termination acts of the 1950's and 1960's conclusively show that Congress now desires the Indians to be amalgamated with the rest of our population and not to be specially treated "because of their status as Indians" * * * The purpose of the Klamath Termination Act to (a) end federal supervision, (b) remove from the Indians their special status as Indians, and (c) make state laws applicable to them "in the same manner as they apply to other citizens" are expressed and unequivocal in the terms of the Act.'

"We are in agreement with this position.

"Notwithstanding this clear evidence of Congressional purpose, appellants contend that their right to hunt and trap, free from state control upon the area involved, is conferred by treaty; that while Congress has the power to abrogate such treaty rights, it will not be assumed to have done so in absence of express language; that there is nothing in the Termination Act limiting their right to hunt and trap upon the lands assigned to them by treaty.

"If appellants are correct in their position not only is their right to hunt and trap on the lands in question (or, indeed, on any former reservation lands which may have been taken into private ownership) one which is free from state control; their right is exclusive; no one else may hunt or trap on these lands. Their treaty secured to the Indians 'the exclusive right of taking fish in the streams and lakes, included in said reservation * * *.' 16 Stat. 707. By judicial interpretation of the District Court in 1956, 139 F. Supp. at 637, this right was extended to hunting and trapping.

"We agree that the Termination Act has not expressly dealt with any treaty rights respecting hunting and trapping. It has, however, most certainly reduced

the area to which those rights attach. By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, supra, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.

* * *

"If § 564m(b) has preserved to the Indians fishing rights and privileges to the extent previously enjoyed and thus not limited to the present reservation's area (a question not before us), it has done so by an express statutory grant of rights which the Indians could not otherwise have claimed since, *under the treaty, their rights were limited to the reservation land. With complete awareness of the Indian's claims to hunting and trapping rights Congress has seen fit to limit the application of this section to fishing alone and must be presumed to have intended the section to be thus limited.*" (Emphasis added)

The portion of the Wold River Treaty on which the Menominees' rights are founded reads as follows (10 Stat. 1064, 1065):

"Articles of agreement made and concluded * * * between the United States of America * * * and the Menominee Tribe of Indians * * *.

* * *

ARTICLE 2 * * * the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin * * *"

Thus, the court's statement in the *Klamath* case, *supra,* to the effect that the rights are limited to reservation lands is equally applicable here. The Menominees' hunting and fishing rights are grounded upon the phrase "as Indian lands are held." These rights, like the rights of the Klamath Tribe, are based upon the government's "reserving" the lands for tribal use. The lands are, as a result of termination, now in the ownership of a private corporation, and the reservation no longer exists.

Thus, the Klamath Termination Act, and the *Klamath* case, if they constitute any authority at all, provide support for the proposition that the Menominees' special hunting and fishing rights were indeed extinguished by the Termination Act.

VII. AFFIRMANCE OF THE DECISION BELOW WOULD CUT INTO THE SOVEREIGNTY OF THE STATE OF WISCONSIN, AND, WITHOUT CLARIFICATION WOULD RENDER IMPOSSIBLE THE MAINTENANCE OF CONSERVATION MANAGEMENT AND ENFORCEMENT PROGRAMS.

The Act of April 20, 1836 (5 Stat. 10), which created the Wisconsin Territory, contained an express reservation of Indian rights. Both the Enabling Act of August 6, 1846 (9 Stat. 56), and the Act of May 29, 1848 (9 Stat. 233), which admitted Wisconsin to the Union, are silent on the subject of Indian rights.

A few months after Wisconsin achieved statehood, the Menominee Indians ceded and conveyed all their Wisconsin lands to the United States in anticipation of the tribe's removal to other lands west of the Mississippi.

(Treaty of October 18, 1848, 10 Stat. 952.) The removal never fully succeeded, and on May 12, 1854, the United States carved the former Menominee Reservation out of this tract of ceded land in the Wolf River Treaty, which is the origin of the Menominee Tribe's special hunting and fishing rights.

Wisconsin was admitted into the Union on an equal footing with the original states. Accordingly, the Enabling Act of August 6, 1846, and the act admitting Wisconsin into the Union are in patent conflict with any grant, express or implied, of hunting privileges in favor of the Indians which would survive a conveyance of title to the reservation lands to a private corporation and the dissolution of the reservation and the tribal organization. By reason of its prior admission to the Union, the sovereignty of the State of Wisconsin had attached—in one form or another—to the lands designated in 1854 as the Menominee Reservation. Today, with all former reservation lands in private ownership (either by the corporation or by individual Indian citizens), that sovereignty is complete insofar as Menominee County is concerned. The special tribal hunting and fishing rights granted by the treaty cannot survive termination of the tribe as a political entity and termination of the reservation status of the Menominee lands.

If the Court of Claims decision is allowed to stand, and the law is stated to be that these treaty rights exist, it would appear that they must exist in Menominee Enterprises, Inc., the "successor entity" to the Menominee Tribe.[12] This conclusion follows from the fact that special

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[12]See discussion at pp. 24-26, **supra.**

Indian hunting and fishing rights are "property"[13]—as was ably argued by the petitioners herein before the Court of Claims—and the Termination Act specifically transferred all tribal "property" and all "assets" of the tribe to a private corporation.

If, as it appears, the hunting and fishing rights survive in the corporation, the criterion for exercise of these rights would appear to be ownership of a share or shares of stock in the corporation. The stock is, however, transferable by gift or inheritance to members of a shareholder's family—some of whom were not enrolled members of the tribe when the rolls were closed. It eventually will be fully and completely alienable. Thus, to say that the treaty rights follow the stock is to permit them to be acquired and exercised by non-tribal members, and, not inconceivably, by non-Indians.

Even if these right were said to survive only in enrolled tribal members, they would, by virtue of the closing of the rolls in 1954, eventually disappear by attrition.

In either case, the problem of identification would be nearly insurmountable, insofar as conservation law enforcement is concerned. Some county residents would be exempt from these laws and some not.

It cannot seriously be claimed that such rights, if found to continue, will attach to all lands and waters within the former reservation. All these lands have been patented and conveyed to a private corporation and, in some cases to individual citizens. In *State v. Johnson* (1933),

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[13]See **Federal Indian Law, supra,** p. 583; Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504, 517-518 (1964); and cases cited at pp. 24-26, in the Petitioner's Brief in the court below.

212 Wis. 301, 305, 249 N. W. 284, the Wisconsin Supreme Court stated:

> "* * * The controlling question, therefore, is whether fully patented lands located within the exterior limits of an Indian reservation may properly be held to be 'within the limits of an Indian reservation.' We do not think that lands, the title to which has been fully relinquished by the United States and to which the jurisdiction of the state, for taxation and other governmental purposes, has attached, are 'within the limits of an Indian reservation' as that language should be construed."

See also *Williams v. United States* (9th Circ., 1954), 215 Fed. (2d) 1, 3, cert. den. 348 U. S. 938; *Clairmont v. United States* (1912), 225 U. S. 551, 32 S. Ct. 787, 790, 56 L. Ed. 1201.

The parties to this action have not offered any solution to these fundamental problems, which are certain to arise should this court hold that the 1854 treaty rights survive. If such a decision is issued with no indication of the entity or entities who presently possess them, the method of determining the constituency of these entities, whether they are transferable, or on what land areas they may be exercised, the state's efforts to maintain sound and effective conservation management and enforcement programs will be thwarted. Presumably, the wardens would have to determine whether the individual is possessed of these rights, and whether the land on which he stands has been conveyed or still remains in corporate ownership. As time passes and the corporate stock, as well as the land becomes fully alienable, these problems will be compounded. The parties have done no more than claim that these rights,

whatever they may be, continue to exist. Wherever, and in whomever they exist is left open.

VIII. TREATY HUNTING AND FISHING RIGHTS CONSTITUTE VALUABLE PROPERTY, AND THEIR LOSS IS COMPENSABLE.

Since this question will be discussed by the claimants, the Menominee Tribe, et al., the State of Wisconsin, as *amicus curiae,* will do no more than state its contention that the exclusive hunting and fishing rights held by the Menominees under the provisions of the Treaty of 1854, were abrogated by the United States through the enactment of 25 U.S.C. secs. 891-902, and that, such rights being valuable property rights, their loss is compensable by the federal government.

The State of Wisconsin, through its supreme court and law enforcement officers, was merely carrying out the Congressional mandate in applying its fish and game laws to the Menominees, *State v. Sanapaw, supra,* and is in no way liable for the loss suffered by the Menominee people, as intimated by the court below.

IX. CONCLUSION

The Congress of the United States has plenary power over the affairs of the Indians and Indian Tribes. By the express terms of the Termination Act the United States Congress has abolished the Menominee Indian Reservation, and has ended the Federal trusteeship over the Menominee Indian people. Accordingly, the reservation area and the enrolled members of what was formerly the Menominee

Indian Tribe are now fully assimilated under the laws of the State of Wisconsin.

Prior to termination, the United States held title to the forest lands and other property within the reservation. The people were governed and served by a tribal government operating under a tribal constitution. Among the services performed by the tribal government were law and order, and conservation enforcement functions. The governmental structure and all tribal property was under the general supervision of the federal government.

Today the former reservation is a duly organized county within the State of Wisconsin. Governmental services are provided by the state and duly constituted county and town boards. All land is owned by a private corporation or individual residents of the county.

Section 899 of the Termination Act is clear and unambiguous. By its express terms, the laws of Wisconsin, without exception, apply to the members of the tribe in the same manner and to the same extent as they apply to other citizens within the state. Conflicting views concerning the effect of the Act (H. R. 2828) upon hunting and fishing by the Menominees were presented at the joint hearing of the committees of Congress. Thus advised and with an alternative bill before it which expressly reserved hunting and fishing privilege (H. R. 7135), Congress enacted the bill which did not reserve such privileges. And, when Congress intends that hunting or fishing privileges enjoyed by Indians be preserved when state jurisdiction over Indians is enlarged by federal act, it has expressly so provided. In P. L. 280 (67 Stat. 588), *supra*, hunting and fishing rights were expressly exempted. In the Klamath Termination Act, water and fishing rights and privileges of the Indians under

Federal treaty, were expressly preserved (68 Stat. 718, 722; 25 U. S. C., sec. 564m). Thus Congress is not unmindful of the matter, and indeed the issue was specifically raised at the hearings on the Menominee bills.

The *Klamath* case is supportive of the position of the State of Wisconsin herein, rather than in view of the parties or the Court of Claims.

The plain intent of Congress to abrogate these rights is not overcome by the contemporaneous passage of Public Law 280, nor by oblique reference to this law in an unrelated portion of the termination plan.

The rights so abrogated by the United States are valuable property rights, arising from treaty, and their loss is compensable by the federal government.

The State of Wisconsin, *amicus curiae,* respectfully urges the Court to reverse the decision of the Court of Claims herein, insofar as it holds that the exclusive treaty rights of the claimants, the Menominee Tribe of Indians, et al., have not been abrogated by the Menominee Termination Act, and that the United States is not liable therefor.

Accordingly, it is urged that the judgment granting the government's motion for summary judgment and dismissing the petition of the plaintiffs be vacated and set aside.

Respectfully submitted,

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